BAIL SLIP

The 1st Appellant/accused No.1(Viz.) Ayyanar was directed to be released on bail as per the order of this Court dated 25.2.98 and made in Crl.MP.No. 1474/98 in CA No. 150/98.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 6-07-2005

Coram:

The Honourable Mr.Justice M.KARPAGAVINAYAGAM
and
The Honourable Mr.Justice S.SARDAR ZACKRIA HUSSAIN

CRIMINAL APPEAL Nos.150 and 969 of 1998

..

C.A.No.150/1998:
1. Ayyanar

2. Allimuthu ..Appellants
(Accused 1 & 2)

vs.

State of Tamilnadu, Rep.by
The Inspector of Police,
Mecherry Police Station
Crime No.525/93) ..Respondent
(Complainant)

C.A.No.969/1998:
State by Public Prosecutor,
Madras. ..Appellant

vs.

1. Ayyanar

2. Allimuthu ..Respondents
(Accused)

Criminal Appeals against the judgment dated 18.2.1998 made in S.C.No.60 of 1997 on the file of the III Additional Sessions Judge, Salem.

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C.A.No.150/1998: For Appellant-1 : Mr.B.Sriramulu, S.C. for
C.A.No.969/1998: For Ist Respondent : Mr.N.A.Ravindran
& Mr. R. Rajendran

C.A.150/1998 : For Appellant-2 : Mr.S.Shanmugavelayutham
C.A.969/1998 : For 2nd Respondent :

C.A.150/1998 : For Respondent : Mr. E. Raja, Addl. P.P.
C.A. 969/98 : For Appellant

....

COMMON JUDGMENT

M.KARPAGAVINAYAGAM, J.

Ayyanar (A1) and Allimuthu (A2) were tried for the offences under Sections 341 and 302 read with 34 I.P.C. The trial Court, ultimately, convicted both the accused finding them guilty in respect of the offence under Section 341 I.P.C. and acquitted them in respect of the offence under Section 302 read with 34 I.P.C. However, A1 alone was convicted for the offence under Section 304 Part I I.P.C. Challenging the above conviction, both the accused have filed appeal in C.A.No.150 of 1998 before this Court. The State, on being aggrieved by the acquittal of both the accused in respect of the offence under Section 302 read with 34 I.P.C., has filed appeal before this Court in C.A.No.969 of 1998.

2. The factual scenario, according to the prosecution, is as follows:

"(a) Ayyanar, the first accused married one Poongodi, who is the daughter of Allimuthu, the second accused. The deceased Kannan is the son of P.W.2 Natesan who is the co-brother of A2 Allimuthu. Both the families are staying in the same village.

(b) Before the marriage, Poongodi and Kannan studied in the same school. At that time itself, they developed illicit intimacy. Even after the marriage of Poongodi, this illicit relationship continued. Both were warned by both the families, but they did not heed to their advice.

(c) On 11.7.1993, Ayyanar (A1) went to his petty shop and came back home in the evening. To his shock, he found in the house that his wife Poongodi and deceased Kannan were in the bed in a compromising position. Having felt pained, the first accused Ayyanar went to the bus stand and thereafter to his garden.

(d) Next day, i.e. on 12.7.1993 at about 10.00 a.m., Ayyanar (A1) came back to his house from his garden. At that time, Poongodi,

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his wife was found writing something in a note book. A1 took the note book and found that she was writing a letter to her paramour Kannan asking him to take her with him so that both could elope. Then, the first accused with the note book went to the house of his father-in-law (A2) and complained to him. Then, both the accused decided to do away with the said Kannan. Thereupon, A1 came to his house and took a Soori knife. Both of them joined together and proceeded towards the house of Kannan through Mecherry Bazaar.

(e) At about 1.30 p.m., the deceased Kannan was found coming in a bicycle on the road in front of Sub Registrar's office. Then, Ayyanar and Allimuthu (A1 and A2) restrained him from proceeding further by hitting his bicycle. The deceased Kannan fell down from the cycle. When he got up, A2 Allimuthu caught hold of the deceased Kannan from behind and A1 Ayyanar stabbed the deceased with Soori knife on the abdomen. Then, the crowd gathered there. This was witnessed by P.W.2, the father of the said Kannan and two other witnesses, viz., P.W.3 Vaithi and P.W.4 Elayaperumal. Thereupon, both the accused escaped from the scene.

(f) On noticing that the deceased was with severe injuries on the stomach gasping for life, P.W.2 Natesan, his father took him to the Government Hospital at Mecherry and then on the advice given there, he took him to Gokulam Hospital and thereafter, he took him to another private hospital where he was declared dead. Thereupon, the dead body was taken back and brought to the Mecherry Police Station.

(g) On getting the information that the deceased died, the first accused went to P.W.1, the Village Administrative Officer, and made an extra-judicial confession, narrating the incident which had taken place in which the deceased died. Then, P.W.1 V.A.O. reduced the same into writing and then took him to the police station and handed over the accused with the knife and the extra-judicial confession EX.P1 to P.W.10 Sub Inspector of Police. The case was registered against both A1 and A2 for the offence under Section 302 I.P.C.

(h) P.W.13, the Inspector of Police received the message. He took up the investigation, went to the scene of occurrence and prepared observation mahazar and rough sketch. He seized M.O.2 cycle from the scene of occurrence. He then conducted inquest and examined P.W.2, P.W.3 and others. Then, from the police station, the body was sent for post-mortem.

(i) P.W.5 Doctor Balalakshmi conducted post-mortem on 13.7.1995 at about 10.20 a.m. and found the injury on the stomach. She issued the post-mortem certificate Ex.P3 giving opinion that the deceased would appear to have died of shock and haemorrhage due to stab injury into the abdomen.

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(j) In the meantime, from A1, the knife was recovered at the police station and he was remanded to judicial custody.

(k) Next day, P.W.13 recovered Ex.P10 note book, written by Poongodi from P.W.6, the wife of A2. He also arranged to send M.O.1 Soori knife, M.O.3 shirt and M.O.4 lungi recovered from the accused for chemical analysis. A2 was also arrested on the same day.

(l) P.W.14, another Inspector of Police took up further investigation and examined other witnesses and recovered M.O.6 motorcycle from the house of A2.

(m) P.W.15, the Inspector of Police sent the note book for comparison of handwriting of Poongodi to the Expert. After obtaining the Chemical Examiner's report and the Handwriting Expert's report, he filed the charge sheet against both the accused under Section 302 read with 34 I.P.C.

3. During the trial, P.Ws.1 to 15 were examined, Exs.P1 to P19 were filed and M.Os.1 to 6 were marked.

4. When the accused were questioned under Section 313 Cr.P.C., they denied their complicity in the crime. On their behalf, Ex.D1 was marked. Both of them filed their respective written statements.

5. The plea of A1 is that A1 suspected the continuance of illegal relationship between Poongodi and Kannan and therefore, she was warned and on knowing this, on the day of occurrence, the deceased Kannan came to the house of A1 and picked up quarrel with him questioning his conduct of abusing Poongodi and during the course of quarrel, the deceased Kannan took out Soori knife and attempted to cause a stab on A1 and during the course of the same, A1 had managed to snatch the knife from the deceased and by way of self-defence, he stabbed the deceased Kannan and thereafter, he went to the police station, surrendered himself and gave a statement.

6. According to A2, though there was a misunderstanding between Kannan and A1 with regard to the illicit relationship, A2 did not accompany A1 to the place of scene and participate in the occurrence.

7. On considering the materials placed by the parties, the trial Court though believed the case of prosecution as far as A1 is concerned, acquitted both A1 and A2 in respect of the offence under Section 302 read with 34 I.P.C. and convicted A1 alone for the offence under Section 304 Part I I.P.C. The trial Court further found both the accused guilty of the offence under Section 341 I.P.C. and convicted them thereunder.

8. As indicated above, having aggrieved over the conviction for

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the offence under Section 341 against both the accused and conviction imposed upon A1 for the offence under Section 304 Part I I.P.C., both the accused filed a single appeal in C.A.No.150 of 1998. The State through Public Prosecutor, aggrieved by the acquittal of both the accused in respect of the offence under Section 302 read with 34 I.P.C., filed an appeal in C.A.No.969 of 1998, on the ground that exception would not apply and so conviction for lesser offence is not legal.

9. Mr.B.Sriramulu, the learned Senior Counsel appearing for A1 Ayyanar, would take us through the entire evidence and contend that there are various infirmities in the evidence of the eye witnesses P.W.2 and P.W.4, especially when both of them are chance witnesses and at any rate, P.W.4 could not have been present in the place of occurrence and purposely, the police put him as an eye witness in the charge sheet, even though he was examined after 10 days. The learned Senior Counsel would further contend that the failure on the part of both P.Ws.2 and 4 to report about the matter immediately to the police station which is situated nearby the place of occurrence would make their evidence doubtful and the extra-judicial confession given by A1 to V.A.O., P.W.1, cannot be given due credence in the light of the fact that V.A.O. has not chosen to follow the procedure to record the extra-judicial confession and as such, the entire case of the prosecution would bristle with several suspicious features. While opposing the appeal against acquittal filed by the State, he would contend that even assuming that the prosecution case is true, the conclusion arrived at by the trial Court that the first accused is liable to be convicted only for the lesser offence, namely, Section 304 Part-I I.P.C. is preferably valid, as there are materials to show that the occurrence took place in a sudden, grave and sustained provocation and the accused had caused only a single stab.

10. Mr.S.Shanmugavelayutham, the counsel for A2 Allimuthu, would contend that Ex.P1, the extra-judicial confession, given by A1 to V.A.O., P.W.1, implicating A2, cannot at all be taken into consideration and, if at all, it could be used only against A1 and not against A2. He would also point out the variation found in the deposition of the witnesses, P.Ws.2 and 4 with reference to the part played by A2. According to the learned counsel, A2 is liable to be acquitted in entirety.

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11. Mr.E.Raja, learned Additional Public Prosecutor, while elaborating the reasonings for accepting the prosecution case, would contend that the trial Court having held that the prosecution case is true, ought not to have acquitted A1 and A2 in respect of the offence under Section 302 read with 34 I.P.C. as there are no materials to show that the occurrence took place in a sudden and grave provocation so as to invoke Exception 1 to Section 300 I.P.C. In brief, the submission made by the learned Additional Public Prosecutor is that

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the judgment of acquittal in respect of the offence under Section 302 read with 34 I.P.C. has to be set aside and both the accused must be convicted for the offence under Section 302 read with 34 I.P.C.

12. The counsel for the parties would cite various authorities to substantiate their respective pleas.

13. We have heard the counsel for the parties and given our careful consideration to the rival contentions.

14. According to the prosecution, Ayyanar (A1), husband of Poongodi, on noticing his wife writing a letter in a note book asking Kannan, her paramour, the deceased, to take her out of the house so that they could elope, took the note book to his father-in-law (A2) and showed the same and thereafter, they decided to do away with Kannan, the deceased and then, the first accused Ayyanar went to his house and took Soori knife and both of them proceeded to the house of the deceased Kannan and on the way, they found Kannan coming in a bicycle and both of them waylaid him and while A2 Allimuthu caught hold of him, A1 Ayyanar stabbed him with the knife and caused his death and hence both of them are liable to be convicted for murder.

15. Before dealing with the evidence relating to the part played by A1, who attacked the deceased and caused his death, it would be appropriate to consider the role played by A2, the father- in-law of A1, in the light of the submissions made by Mr.Shanmugavelayutham, the learned counsel for A2.

16. The earliest document in this case is Ex.P1, the extra-judicial confession, made by A1 to P.W.1. In Ex.P1, the part played by A2 has been mentioned. According to the extra-judicial confession Ex.P1, made to P.W.1, both the accused i.e., A1 and A2 waylaid the deceased and while A2 caught hold of him, A1 stabbed him on the stomach. P.W.2, the father of the deceased, one of the eye witnesses, would state that both the accused came in different motorbikes and stopped Kannan from proceeding further in the bicycle by hitting against it. The deceased Kannan fell down. Then, A2 caught hold of the hands of the deceased from behind. Thereupon, A1 stabbed on the stomach. On the contrary, P.W.4 Elayaperumal, another eye witness, would state that the second accused came near to the deceased and caught hold of his hands from backside and lifted him and asked A1 to remove the knife which was kept in the box of his motorcycle and on his instigation, A1 opened the box attached with the motorcycle, removed the knife and then stabbed on the stomach of the deceased. The comparison of Ex.P1 with the deposition of P.W.2 and P.W.4 would indicate that there is not only an improved version by the witnesses stage by stage with reference to the role played by A2 but also there is inconsistency in regard to the overt act attributed to A2.

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17. It is the admitted case of the prosecution that after the occurrence was over, both the accused left the place and A2 went to the police station and met the Head Constable Rathinam and talked something with him and thereafter he left in his motorcycle and A1 straight went to P.W.1, the V.A.O., and made an extra-judicial confession, implicating himself and A2. This conduct of the accused 1 and 2, as projected by the prosecution, is quite artificial.

18. If both of them were parties to the occurrence, either both should have gone together to the police station to surrender or both should have appeared together before the Village Administrative Officer for making the extra-judicial confession. It is quite strange to see that A1 went to V.A.O. separately while A2 alone went to the police station straight. The very fact that A2 went to the police station and had a mere conversation with Rathinam, Head Constable, would indicate that he would not have participated in the occurrence and he wanted to convey some other information to Head Constable and accordingly he met him and then went away. If both of them were the parties to the attack on the deceased, there is no necessity for A2 to allow A1 alone to go to V.A.O. and there is no reason for him to go alone to the police station.

19. As pointed out by the learned counsel for A2, the extra-judicial confession Ex.P1 which is inculpatory statement made by A1 to P.W.1 implicating himself and A2 would not be of any evidentiary value as against A2 in the absence of any other acceptable materials against him. In this context, it is to be remembered that A2 has been acquitted of the major offence by the trial Court itself. Therefore, we are of the view that the presence of A2 in the place of occurrence is doubtful and, as such, his alleged act of wrongful restraint of the deceased along with A1 cannot be said to be established. Hence, the conviction and sentence imposed upon A2 are liable to be set aside.

20. We shall now come to the materials as against A1. P.Ws.2 and 4 are the eye witnesses. P.W.2, the father of the deceased had been examined during the course of the inquest. P.W.4, even though was not examined during the inquest, was examined during the course of the investigation when P.W.14, the successor Police Officer, took up further investigation.

21. Though it is argued that P.Ws.2 and 4 would not have been present during the course of the occurrence, we are unable to accept the said contention as, in our view, the evidence of P.W.2 and P.W.4, which is cogent and consistent with reference to the occurrence, inspires confidence, in the light of the fact that the evidence of P.W.6 Doctor and the post-mortem certificate Ex.P3 would clearly corroborate their testimony.

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22. It has been argued that P.W.2 and P.W.4 had not chosen to report to the police immediately and as such, their evidence cannot be believed. This is a case where P.W.2, on seeing his son, the deceased, falling down with injury, had an anxiety to save his son and arranged to take him to the Government Hospital and thereupon, on their advice, he took him to various hospitals and ultimately, the deceased was declared dead and only then he came to the police station along with the dead body to report about the matter. There, he came to know that in the meantime a case was registered and accused were arrested. Under those circumstances, it cannot be said that failure on the part of P.W.2 to report to the police station immediately after the occurrence would be a ground to disbelieve his evidence.

23. Similarly, merely because there was some delay in examination of P.W.4, it cannot be said that the prosecution version becomes doubtful. It cannot be laid down as a rule of universal application that if there is any delay in examination of particular witness, his evidence shall be looked upon with suspicion. As observed in 2003 SUPREME COURT CASES (CRI.) 201 (BODHRAJ ALIAS BODHA AND OTHERS v. STATE OF JUMMU AND KASHMIR), the investigating officer has to be specifically asked as to the reasons for the delayed examination of the said witness. In the instant case, no questions were put to the investigating officer. A reading of the deposition of P.W.4 as a whole would clearly indicate that he also was present near the place of occurrence when the occurrence had taken place and thereafter, A1 was in the police station and a lot of crowd gathered in front of the police station compelling the police to arrest A2 also. In such circumstances, it cannot be stated that his non-complaining to police, especially when the police have already taken action against A1, would create any suspicion with reference to his presence at the time of occurrence.

24. The evidence of both P.W.2 and P.W.4 is not only corroborated by the medical evidence, but also by the fact that the weapon recovered from the accused contained the blood group 'O' which tallied with the blood group of the deceased, as referred to in the report Ex.P7.

25. Further, the motive part also has been clearly established through the materials, such as the evidence of P.W.2; Ex.P1, the extra-judicial confession made by A1 to P.W.1 and Ex.P12, the note book recovered from the house of A2. The report of the Handwriting Expert Ex.P19 would clearly indicate that the letter in Ex.P12 note book requesting the deceased Kannan to take her out of the house to avoid further torture from the first accused and to settle somewhere else was found to be in the handwriting of A1's wife Poongodi. That apart, both A1 and A2 themselves in their written statements would clearly state that there was an illicit relationship between the

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deceased Kannan and Poongodi and consequently, there was an ill-will and enmity for the accused against the deceased.

26. Under those circumstances, we are of the view that the prosecution has established the fact that the deceased and the wife of A1 continued their illegal relationship and so the deceased was done to death at the hands of the first accused and, as such, the conclusion arrived at by the trial Court with reference to the part played by A1 is perfectly justified.

27. The next question that arises for consideration is as to whether the plea of private defence, which is one of the limbs of arguments advanced by the learned Senior counsel for the first accused on the strength of the written statement filed by A1 at the stage of Section 313 Cr.P.C. questioning, can be accepted?

28. At the outset, this plea of private defence has to be rejected for the simple reason that nothing has been culled out from any one of the witnesses with reference to this plea and nothing was suggested relating to this plea to any one of the witnesses during the cross-examination.

29. The plea of the accused in the written statement is that the occurrence had taken place inside the house of A1, when Kannan voluntarily came and picked up quarrel. This plea has no basis. On the other hand, the cycle, in which the deceased was proceeding on the road near to the Sub Registrar's office, was recovered from the scene. It is not disputed that the cycle belonged to the deceased.

30. The mere fact that no bloodstained earth was taken from the scene would not be a ground to hold that the occurrence had not taken place in the said place, especially when P.W.2 would clearly explain in the cross-examination by stating that when the blood was coming out of the stomach, P.W.2 and others put cotton on the wound and prevented the bleeding. Therefore, there is no difficulty in accepting the case of the prosecution that the occurrence had taken place only in the scene near the Sub Registrar's office and not in the house of A1 and, as such, the plea of private defence has to be rejected in toto.

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31. The alternative argument advanced by the learned Senior Counsel appearing for the first accused, by way of reply to the Additional Public Prosecutor in the appeal against acquittal, is that at any rate, the conclusion arrived at by the trial Court that the offence is not a murder and only culpable homicide not amounting to murder as the occurrence had taken place in a sudden and grave provocation is perfectly valid. He would elaborate the said argument by stating that there are materials not only to show that there was sudden and grave provocation but also that the incident was on

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account of sustained provocation and, as such, Exception 1 to Section 300 I.P.C. will apply to the facts of the case and consequently, the conviction for the offence under Section 304 Part-I I.P.C. imposed by the trial Court may be sustained and the appeal by the State may be dismissed. He also cited 1988 L.W.(CRL.) 113 (CHANDRAN, IN RE) and an unreported judgment of this Court in C.A.No.64 of 1991, dated 10.10.2000, to substantiate his submissions.

32. Let us now deal with the contention urged by the learned Senior Counsel appearing for A-1, relating to sudden and grave provocation on account of sustained provocation, in order to bring it under Exception 1 to Section 300 I.P.C.

33. As per Exception 1 to Section 300 I.P.C., culpable homicide is not murder, if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident. In order to bring the case under Exception 1 to Section 300 I.P.C., it is necessary that the following facts should be established :

(1) The offender must have done the act whilst deprived of the power of self-control;

(2) He must have been so deprived by reason of the provocation;

(3) The provocation must have been grave and sudden;

(4) The provocation must not have been sought for by the offender;

(5) It must not have been voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

34. It is common knowledge that the term "self-control" in the said provision is a subjective phenomenon and it can be inferred from the surrounding circumstances of a given case. Therefore, in order to find out whether the last act of provocation upon which the offender caused the death was sufficiently grave as to deprive him of the power of self-control, we have to take into consideration the previous act of provocation, caused by the deceased person.

35. While interpreting the words "grave provocation" and "sustained provocation", a Division Bench of this Court has rendered a decision in Suyambukkani v. State (1989 L.W.(Crl.86), holding that though there is a difference between provocation as defined under Exception 1 and sustained provocation, the ingredient of sustained provocation is a series of acts more or less grave spread over a

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certain period of time, the last of which acting as the last straw breaking the camel's back may even be a very trifling one and, as such, the sustained provocation also is an addition to the ingredient of grave and sudden provocation, contemplated under Exception 1 to Section 300 I.P.C.

36. The Courts, through the decisions in A.I.R.1962 S.C. 605 (K.M.NANAVATI v. STATE OF MAHARASHTRA); I.L.R.2 MADRAS 122 (THE EMPRESS v. KHAGAYI); I.L.R.3 MADRAS 33 (BOYA MUNIGADU v. THE QUEEN); A.I.R.1957 MADRAS 541 (MURUGIEN, IN RE); A.I.R.1958 ANDHRA 235 (CHERVIRALA NARAYAN, IN RE); A.I.R.1938 ALLAHABAD 532 (BALKU v. EMPEROR); A.I.R.1960 ALLAHABAD 223 (BABU LAL v. STATE) and 1989 LAW WEEKLY (CRI.) 86 (SUYAMBUKKANI v. STATE OF TAMIL NADU), have added one more exception, known as 'sustained provocation'. Admittedly, the word 'sustained provocation' is not available in Exception 1 to Section 300 I.P.C. With these decisions, attempts have been made to bring sustained provocation under Exception 1 to Section 300 I.P.C.

37. There is a cardinal difference between provocation as defined under Exception 1 to Section 300 and sustained provocation. The only word which is common is 'provocation'. What Exception 1 contemplates is, a grave and sudden provocation, whereas the ingredient of sustained provocation is a series of acts more or less grave spread over a certain period of time, the last of which acting as the last straw breaking the camel's back. The last incident may even be a trifling one. Therefore, while considering whether there are materials to indicate that there is a grave and sudden provocation as contemplated under Exception 1 to Section 300 I.P.C., the sustained provocation, on account of a series of acts more or less grave spread over a certain period of time, would be undoubtedly considered as an addition to Exception 1 to Section 300 I.P.C.

38. While considering Exception 1 to Section 300 I.P.C., the Courts have to analyse the materials in order to find out whether the provocation was sudden and grave. It means, if the provocation is not grave or not more serious in nature, it will not come under Exception 1 to Section 300 I.P.C. But, for this proposition, there is some exception with reference to the applicability of sustained provocation. In other words, if the accused has been nurturing ill-will for a long period because of the conduct of the deceased, even in the long period, due to the series of acts, the last act which provoked the accused to attack the deceased on the spur of the moment might be a trifling one. Also, while considering the exception in relation to sudden and grave provocation, the Court has to consider not only the last incident, which is a trifling one, but also the series of incidents which took place earlier, due to which the accused was nurturing ill-will against the deceased.

39. Bearing these principles in mind, we have to analyse the

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prosecution case to find out whether the case of the accused would come under the first exception to Section 300 I.P.C.

40. According to the prosecution, the first accused on 11.7.1993 evening, when he came back home, found his wife Poongodi and the deceased in a compromising position. At that time, he did not react. He went to the bus stand and thereafter, went to his garden. Next day morning, he came at 10.00 a.m. At that point of time, he found that Poongodi, his wife, writing something in a note book. He snatched the note book from her and found out that she was writing a letter to the said Kannan, the deceased, asking him to take her along with him so that they could elope. At that time also, he did not react. On the other hand, he went and met A2, his father-in-law, and showed the note book to him. Thus, the incident that took place in the earlier day evening, when he found both his wife and the deceased in compromising position, and the incident on the next day morning, wherein he found his wife writing a letter to her paramour, did not give rise to any provocation, which is sudden and grave. Conversely, he went to A2's house and complained to him and thereupon, he took a decision, came home, took the knife with him and proceeded towards the house of Kannan for the purpose of causing his death. On noticing Kannan coming in a cycle in the opposite direction, he waylaid him and attacked him with the knife by inflicting injury on the stomach.

41. In this case, if at all there is a chance for sudden and grave provocation for the first accused to get provoked and to do harm to the life of the deceased, it must be only when he saw the deceased in a compromising position with Poongodi, his wife. At that time, he had no provocation. Next day, he came and saw his wife writing letter in a note book to the deceased asking him to come and take her. At that time also, there was no provocation. If at all there was any sudden and grave provocation for the first accused, it must be at that moment only by attacking the said Poongodi. But, that is not the case here. On the other hand, he went to the house of A2 and after a deliberation, he came home and took the knife and thereafter, proceeded to the house of Kannan with a design to kill him and on seeing him coming in the opposite direction, attacked him and caused his death. So, there is neither sudden and grave provocation nor anything happened at the time of the incident at the instance of the deceased so as to provoke him further to attack the deceased out of sustained provocation.

42. Both the decisions cited by the learned Senior Counsel for the first appellant would refer to various incidents in which the accused was nurturing the ill-will against the deceased and also the provocative words used by the deceased against the accused in the last incident, due to which the accused got provoked and committed the act. These decisions would not apply to the present case.

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43. Lastly, it is argued that it was a single stab on a non-vital part and therefore, it would attract the lesser offence, on the strength of the decision in K.RAMAKRISHNAN UNNITHAN v. STATE OF KERALA (A.I.R.1999 S.C.1428).

44. This submission also, in our view, lacks substance. According to the prosecution, the first accused came to the place of occurrence with a pre-concerted plan to attack the deceased and cause his death. P.W.5, the Doctor has given evidence that the injury is sufficient to cause the death in the ordinary course of nature. In Ex.P3, the opinion has been given that the deceased would appear to have died of shock and haemorrhage due to stab injury into the abdomen.

45. It is true, as admitted by P.W.5 Doctor, that stomach is a non-vital part. But, the fact remains that it has caused a very serious injury on a vital part inside the body. The details are as follows:

> "A stab wound 2.5 cm x 1.5. cm extending into the peritoneal cavity 5 cm above the umbilicus in the midline towards right to left, above downwards. () edges clear cut. Internal Exam: On opening the wound 10 cm x 6 cm x 2.5 cm haematoma seen in the mesocolon. Mesenteric vessels seen cut."

46. The above particulars would indicate that the stab caused a very deep injury into the arteries. These things would make it clear that the first accused must be attributed with the knowledge that when he used M.O.1 Soori knife measuring about 38.5 cm, as found in Ex.P4, Mahazar, and forcefully stabbed on the stomach portion, he knew that it would cause death of the said person. Thus, the intention to kill is so explicit. The intention to cause death has to be inferred from various factors such as the nature of the weapon, nature of the injury, the part of the body on which the injury was inflicted, the force with which the weapon has been employed, the motive and other circumstances.

47. This is a case where the first accused went to his home and took the lengthy knife with a plan to kill the deceased and proceeded towards his house and when the deceased was coming in a bicycle near the Sub Registrar's Office, he gave a heavy stab on the stomach which cut the mesenteric vessels. This definitely indicates the intention of the first accused to use the knife and cause serious injury cutting the mesenteric vessels in order to murder the deceased.

48. When there is no material whatsoever for coming to the conclusion that the incident took place in a sudden and grave provocation or sustained provocation, in the absence of any incident

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causing further provocation to attack the deceased, the trial Court, in our view, ought not to have acquitted the first accused in respect of the major offence under Section 302 I.P.C. and simply convicted him for the lesser offence.

49. While dealing with the appeal against acquittal, the following guidelines have to be borne in mind, as laid down by the Supreme Court :

> (A) There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal in respect of the offence under Section 302 I.P.C. is based.
>
> (B) If two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted.
>
> (C) The paramount consideration of the court is to ensure that miscarriage of justice is prevented.
>
> (D) In a case where admissible evidence is ignored, a duty is cast upon the appellate court to reappreciate the evidence even where the accused has been acquitted, for the purpose of ascertaining as to whether the accused committed the offence or not.

50. The above principles have been laid down by the Supreme Court in STATE OF U.P. v. BABU (2004 S.C.C.(Cri) 144), STATE OF PUNJAB v. KARNAIL SINGH (2004 S.C.C.(Cri) 135) and BHAGWAN SINGH v. STATE OF M.P.(2002(4) S.C.C.85).

51. In this case, the trial Court has not only considered the admissible evidence, but also accepted the evidence and even then, it had acquitted the first accused in respect of the major offence, namely, murder, by ignoring the principles for converting the case of murder into a lesser offence. Therefore, the conviction and sentence imposed upon the first accused under Section 304 Part-I I.P.C. are set aside and instead, he is convicted for the offence under Section 302 I.P.C. and sentenced to undergo life imprisonment.

52. Sum up:

> (i) The conviction and sentence imposed upon A2 for the offence under Section 341 I.P.C. are set aside and he is acquitted of that charge also.
>
> (ii) The conviction and sentence imposed upon A1 under Section 304 Part-I I.P.C. are set aside and instead,

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he is convicted for the offence under Section 302 I.P.C. and sentenced to undergo imprisonment for life.

(iii) The conviction and sentence imposed upon A1 under Section 341 I.P.C. by the trial Court stand confirmed.

(iv) The trial Court is directed to take steps to secure the custody of the first accused to undergo the remaining period of sentence.

(v) Criminal Appeal No.150 of 1998 is partly allowed and Criminal Appeal No.969 of 1998 is allowed.

mam

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1) The III Additional Sessions Judge, Salem.
(In duplicate for communication to the accused)
2) -do through the Prl. Sessions Judge, Salem.
3) The Judicial Magistrate No.II, Mettur, Salem District.
4) -do- through the Chief Judicial Magistrate, Salem.
5) The Superintendent, Central Prison, Coimbatore.
6) The District Collector, Salem.
7) The Director General of Police, Chennai.
8) The Public Prosecutor, High Court, Madras.
9) The Inspector of Police, Mecherry Police Station, Salem.

+ 2 CC TO MR.NA. RAVINDRAN, ADVOCATE SR NO 28339

+ ONE CC TO MR.S. SHANMUGAVELAYUTHAM, SR NO 28236

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Judgment
in
Crl.A.Nos.150 and
969 of 1998

PV (CO)

BP/5.8

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